IN THE WORKERS COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 2001-0300

FILED

SEP 13 2007

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

CASSANDRA SCHMILL

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer

and

MONTANA STATE FUND

Intervenor.

PETITIONER'S REPSONSE TO RESPONDING INSURERS' MOTION TO STAY PROCEEDINGS

COMES NOW the Petitioner, CASSANDRA SCHMILL, by and through her attorneys of record, and files the following response to the Responding Insurers' Motion to Stay Proceedings. For the reasons stated herein, the motion should be denied.

The Responding Insurers' (a title used by Claimant to identify all of the insurers who are participating in the briefing of these issues) have moved the Court to stay implementation of the Findings and Conclusions by Special Master, adopted by this Court by Order dated July 10, 2007, on the grounds that the definitions of "settled" and "final" claims set out in the Court's Order may be altered by the Supreme Court's upcoming decision in *Flynn v. State Fund,* WCC No. 2000-0222, No. DA 06-0734 on appeal, thereby affecting the retroactive application of *Schmill I.* There are several reasons why the Responding Insurers' motion should be denied.

First, Rule 24.5.346(1), Procedural Rules of the Workers' Compensation Court, pertaining to stays, limits the use of stays to judgments or orders which have been appealed:

> "The party appealing a judgment of the Workers' Compensation Judge may request a stay of execution of the judgment or order pending resolution of the appeal . . ."

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[Emphasis added.]

While the Workers' Compensation Court can borrow from the Montana Rules of Civil Procedure when the Court's own rules are silent, such is not the case here. *Lanz v. Liberty NW Ins. Corp.*, 2005 MT WCC 44, ¶100. Rule 24.5.346(2), clearly states that the Court is only to use Rule 7, Montana Rules of Appellate Procedure, in certain circumstances:

> "(2) Except as provided herein, the procedure for requesting a stay and a procedure for posting a supersedeas bond will be the same as the procedure in Rule 7(a) and 7(b), respectively, of the Montana Rules of Appellate Procedure." [Emphasis added.]

Since Rule 24.5.346 is specific in limiting stays to judgments or orders on appeal and since the Court's Order of July 10, 2007, is not on appeal, the Court is without the means to grant the Responding Insurers' Motion to Stay.

Second, even if the Court determines it has the authority to grant a stay at this stage of the proceedings, the motion should be denied. The Responding Insurers' argument that the upcoming decision in *Flynn* may impact the Court's definitions of "settled" and "final" in this case is without merit. Contrary to the State Fund's argument, the Court did not rely on the definitions of "settled" and "final" from *Flynn* when defining those terms in this case.

As to the definition of "settled," the Responding Insurers' conceded the definition was "all claims settled by way of a petition for settlement approved by the Department of Labor & Industry or by way of a stipulated judgment." (State Fund Answer Brief, pp. 2-3, dated 1/16/07; Safeco Responsive Brief, p. 4, dated 1/16/07; Responding Insurers' Responsive Brief, p. 5, dated 1/16/07.) This was the definition set out in *Stavenjord II*, which came down after the Workers' Compensation Court's order in *Flynn*. Thus, the definition of "settled" was not only conceded by all parties in this case, but was derived from *Stavenjord II*, not *Flynn*.

The definition of "final" in this case is likewise not a product of the *Flynn* decision. *Flynn* defined "final" as follows:

> "A FINAL CLAIM is a claim in which a final judgment has been entered by the Workers' Compensation Court only if the claim is not currently pending on appeal." *Flynn*, ¶28.

In its Order of July 10, 2007, the Workers' Compensation Court defined "final" in this case as follows:

> "[C]ases in which a final judgment was entered by the Workers' Compensation Court, and that judgment is not pending on appeal to the Montana Supreme Court, if the circumstances of the particular judgment indicate that the

> underlying occupational disease claim is no longer actionable." ¶56c.

In arriving at its definition of "settled," the Workers' Compensation Court relied on the holdings in *Schmill II* ("'retroactive effect of decision . . . does not apply to cases that **became final or were settled** prior to a decision's issuances.'" [Emphasis in original.] ¶17), and *Stavenjord II* ("'open claims' will encompass those which are still actionable, in negotiation but not yet settled, now in litigation, or pending on direct appeal." ¶15.) (July 10, 2007, Order, ¶¶13, 27.) This Court went on to reject the discussion in *Flynn* pertaining to "paid in full" claims as being within the definition of "settled" by specially relying on the *Stavenjord II* decision:

> "Further, the Special Master concludes that the *Stavenjord II* decision, issued after the WCC's *Flynn* order, indicates that 'paid in full' claims should not be deemed 'settled.'" ¶40

In addition to not relying on *Flynn* for the definition of settled and final, the Court's Order of July 10, 2007, factually distinguishes *Schmill* from *Flynn* should the definition of "settled" be altered on appeal to include claims "paid in full." According to this Court, Class II and Class III(b) claims in *Schmill* are not "paid in full":

> "Turning first to Class II claims, these claims involve an occupational disease claimant whose temporary total disability benefits ceased when she or he returned to work with no wage loss and no additional benefits were paid other than medical benefits. It is possible, and not uncommon, for a claimant whose temporary total disability benefits ceased upon return to work to become once more entitled to temporary total disability benefits due to relapse into disability. In addition, entitlement to medical benefits typically continues in such cases. Class II claims cannot be considered 'paid in full.'
>
> In the situation of claimants whose permanent total disability benefits have ceased because they reached retirement age (Class III(b)), medical benefits related to the occupational disease typically remain payable when reasonable and necessary. Where these claims are not 'paid in full,' they are not 'settled,' even if the 'paid in full' language is include in the definition of 'settled claim.' In addition, these claims remain 'open' and 'actionable' under the *Stavenjord II* definitions should circumstances arise to mandate entitlement to additional benefits.
>
> Finally, in the context of workers' compensation/occupational

> disease claims as described above, where claims typically remain 'open' and 'actionable' unless settled or closed by final judgment, the Special Master notes that describing Class II and III(b) claims as 'paid and [sic] full' may be no different than describing those claims as 'closed' or 'inactive.' Excluding 'closed' or 'inactive' cases from the common fund was rejected by the WCC in *Flynn.* The 'paid in full' status of Class II or Class III(b) claims may justify moving the insurance file to a location outside the Montana claims examiner's office under §39-71-107, MCA, but does not justify removing the case from the retroactive application of *Schmill.* Such files must be located and reviewed." (¶¶43, 44, and 45.)

The only argument in the *Flynn* appeal which has the potential to effect the scope of the retroactive application of *Schmill I* is the "paid in full" argument. Since the Court has already determined that none of the disputed *Schmill* claims (Class II and Class III(b)) have been paid in full, there is no need to wait for the *Flynn II* decision before proceeding with implementation of the Court's Order of July 10, 2007. When a decision in a related action pending before the Supreme Court might eliminate the need for a decision in this Court a stay might be appropriate. *See, eg., Schara v. Anaconda Co.*, (1980), 187 Mont. 377, 383-84, 610 P.2d 132, 135-36 (finding district court erred in not staying proceeding to enforce restrictive covenant pending decision on condemnation action which would have mooted the action to enforce the covenant). Such is not the case here and, therefore, a stay is not warranted.

Lastly, should the Court be persuaded that a stay is appropriate, the Claimant would ask that the stay be limited to that portion of the Court's Order finding Class II and Class III(b) claims subject to the retroactive effect of *Schmill I.* In other words, as to the claims to which the Responding Insurers have conceded the retroactive application of *Schmill*, Class I and Class III(a) claims, the Responding Insurers should be required to begin paying these claims. In this regard, the argument that a stay is warranted so as to protect insurers from having to engage in "expansive file reviews to identify claimants and to pay retroactive benefits," is misleading. (Responding Insurers' Motion to Stay Proceeding, p. 7.) A full stay will postpone that duty at best, not eliminate it. Since the Responding Insurers will have to do the file reviews sooner or later to pay the undisputed claims, there is no justification for requiring these claimants to wait any longer for the benefits they are due. It is the understanding of Claimant's counsel that the State Fund has already paid many of these claims. (See Docket Nos. 368, 370, 371, 373, and 378.) The other insurers should be ordered to do so as well, or be subject to a penalty and fees for unreasonable delay in the payment of benefits due and owing.

CONCLUSION

The Responding Insurers' Motion to Stay Proceedings is procedurally flawed. The Court has no jurisdiction to grant the motion as the July 10, 2007, Order is not on appeal. Even if a stay were procedurally appropriate, it is not factually warranted in this case. Since the Court's determination of what claims are "settled" and which are "final" stems from the Supreme Court decisions in *Schmill II* and *Stavenjord II*, the Supreme Court's rejection of any of the *Flynn* analysis will not impact the Court's order in this case. Moreover, the only real dispute is whether the term "settled" includes claims "paid in full." In its Order of July 10, 2007, the Court has already determined that none of the disputed claims in *Schmill* were paid in full and, therefore, any change in the definition of "settled" to include "paid in full" claims would not change the Court's Order of July 10, 2007.

WHEREFORE, for the foregoing reasons, the Petitioner respectfully requests that the Responding Insurers' Motion to Stay Proceedings be denied. If the Court determines that it is appropriate to issue a stay of the implementation of its Order of July 10, 2007, the Petitioner would request that the stay be limited to the disputed Class II and Class III(b) claims, with the Court specifically ordering that all other open claims be paid immediately.

DATED this 12 of September, 2007.

ATTORNEYS FOR PETITIONER

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By: Laurie Wallace
LAURIE WALLACE

CERTIFICATE OF MAILING

I, Robin Stephens, do hereby certify that on the 12 day of September, 2007, I served a true and accurate copy of the PETITIONER'S RESPONSE TO RESONDING INSURERS' MOTION TO STAY PROCEEDINGS by U.S. mail, first class, postage prepaid to the following:

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September 12, 2007

Ms. Clara Wilson
Clerk of Workers'
Compensation Court
P.O. Box 537
Helena, MT 59624-0537

RE: SCHMILL v. LIBERTY NW INS. CORP.
WCC No. 2001-0300

Dear Ms. Wilson:

Enclosed please find the Petitioner's Response to Respondent Insurers' Motion to Stay Proceedings in regard to the above-referenced matter.

Should you have any questions concerning this matter, please contact me directly.

Sincerely,

Laurie Wallace

LAURIE WALLACE
BOTHE & LAURIDSEN, P.C.

LW/rs
Enc.
cc: Bradley Luck
Larry Jones
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Geoffrey Keller